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THE STRUCTURE AND PROCEDURE OF THE *SHARĪ'AH* COURTS
HISTORICAL DYNAMICS AND SOME CONTEMPORARY PRACTICES

DR. SAYED SIKANDER SHAH HANEEF
C-11-3A, Pelangi Kondo, JLN Pelangi,
TMN Pelangi, Sentul, 511000,
Kuala Lumpur, Malaysia.

To ensure that equilibrated, balanced and equitable fulfilment of people's mutual rights and obligations are achieved and their disputes adjudicated, rule of law or justice has remained and reigned as one of the supreme goals of Islam. To this end, therefore, the Prophet (ﷺ), through judicial practice and decrees, guided the *ummah* as to the process and principles of administering justice in the Islamic setting.

Subsequently, the Islamic caliphates and dynasties reapplied, adapted and expanded the basic principles of adjudications as laid down by the Prophet (ﷺ), and improved upon the structure of judicial machinery to suit the requirement of time and space. With the decline of Muslim hegemony and ascendancy of European powers some of the Muslims' judicial institutions (mostly in the colonies), such as *maẓālim* (board of grievances) were disbanded, the jurisdiction of its *Sharī'ah* courts was curtailed and even disbanded and their code of procedures somewhat discarded.

After independence of Muslim states in the post-World War II scenario and their desire to revert towards their Islamic identity, the urge to reinstate the *Sharī'ah* courts and reconstruct their code of procedure became part of universal goal of Islamization of Muslim societies and their laws. To accomplish this, the approaches have not been uniform. Some advocated full reenactment of the classical models and others opted for Islamizing the existing system. For example, Saudi Arabia* model represents

*Due to its remaining independent from the Colonial system and adoption of Salafi or Wahhabi interpretation of *Sharī'ah* – *Ed.*

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the first model with limited influence from the European models and others such as Malaysia represents the second, showing greater impact of the civil court system. This essay, therefore, is an attempt at outlining the due process of administering justice in the past and the current practice of the two countries today.

The Place of Justice in Islam

The judicial system in Islam is a system for deciding between people in litigation with the aim of settling their disputes in accordance with the injunctions of the Divine Law (as enshrined in the Qur'ān and the *Sunnah*).

All of the messengers of Allah (علیہم السلام) acted as judges. Allah says:

> We sent aforetime Our apostles with clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice."[1]

Prophet Muḥammad (ﷺ), who came with the final and eternal Message, was ordered by Allah to pass judgment in disputes just as he was ordered to spread the word of Allah and call people to Islam. This is mentioned in the Qur'ān in a number of places. Allah says, for instance:

> "Allah doth command you to render back your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things."[2]

The judicial system is a *necessity* for the prosperity and development of nations. It is needed to secure human happiness, protect the rights of the oppressed, and restrain the oppressor. It is the way to resolve disputes and ensure human rights. It facilitates enjoining what is right, forbidding what is wrong, and curbing immoral behaviour. In this way, a just social order can be enjoyed by all sectors of society, and every individual can feel secure in his life, property, honour, and liberty. In this environment, nations can progress, civilization can be achieved, and people are free to pursue what will better them both spiritually and materially.[3] Therefore,

Islamic law contains its own guidelines to help the realization of this need in the society. Among such justice-assuring measures of Islam are: fixing qualifications for judges, prescribing a unique code ethics for judiciary giving recognition to courts of different hierarchical jurisdictions and setting an adaptable system of procedure of fair trial and prosecution. All these will be delineated in the pages that follow.

Qualification of a Judge (*Qādī*)

In the Islamic view, the judge occupies the most significant position of responsibility next to the Caliph. He is regarded as the Caliph's deputy in meeting out justice among people. Therefore, for a person to qualify for such heavy task, he must have:

Islamic Faith: According to all the jurists the *qāḍī* must be a Muslim in case the litigants are Muslims. The reason being that a judge in the course of his duties will engage in duties that are unsuitable[4] to perform for a non-Muslim magistrate, for instance, to administer Muslim oath or solemnize Muslim marriages. Nevertheless, a non-Muslim is competent to adjudicate among the non-Muslims, and may be assigned duties relating to decide their cases.

Maturity: A minor cannot be appointed as a judge. If he is appointed, then his decisions will not be binding. The basic argument is that people below the age of majority do not have sufficient insight to appreciate the consequences of their actions[5] even for themselves, so it will be injudicious to entrust them with other people's fate and legal destiny.

Sanity: Adjudication requires not only physical maturity but also the ability to make sound and intelligent decision to discriminate between things and solve complex problems. Therefore, a person of low intelligence and the one whose judgment is impaired on account of old age or sickness should not act as a judge.[6]

Masculinity: This is the opinion by the majority. Their reasons are: first, the statement of the Prophet (ﷺ): "A people will never be successful if they put a woman in charge of their affairs."[7] Second it is regarded *harām* (forbidden) for a woman to unnecessarily mix with men, and the duty of *qaḍā* requires such exposure...[8]. The Ḥanafī school of law on the other hand, requires this in major crimes due to inadmissibility of

female testimony in such crimes but allows women as judges to preside over other cases (tort or civil claims).[9]

The most egalitarian opinion on this issue has been advanced by reputed jurists, Ibn Jarīr al-Ṭabarī and the Ẓāhirī school. To them since women can give ruling in questions of jurisprudence (can become jurist-counsel/*muftī*), on the same token they can be competent judges with jurisdiction in all cases. The Ẓāhirī further maintained that 'Umar (the second Caliph) appointed al-Shifa (a woman from the Anṣār of Madinah) as the market inspector in the market of Madinah a body with the same judicial authority as the judges. They refuted the argument by the majority by saying that the *ḥadīth* in question prohibits woman from holding the position of caliph[10] and not of the judiciary.

Uprightness of character (*'adalah*): Most jurists recognize this qualification as a condition for every position of binding, legal authority. This means that a judge must perform all the obligatory religious duties, be honest, have apparent integrity, be free from sinful and licentious behaviour, keep away from dubious activities, conform to social norms, and be a model of good behaviour in his religious and worldly affairs. It is not permissible to appoint an immoral person to a judicial post, because being a judge is one of the greatest trusts that a person can be given. Nevertheless according to the Hanafīs, it is not a condition, a learned profligate who can make decisions without transgressing the bounds of the law may be appointed as a judge.[11]

The capacity for independent juristic reasoning (*ijtihād*): According to majority of the jurists a judge should be a *mujtahid* capable of deriving the Law from its sources. That is to say that he, among others, must: be knowledgeable in the Arabic language and its grammar; have sufficient knowledge of the Qur'ān and *Sunnah* to know where to find both general and specific legislations; know where to find the texts that clarify ambiguous ones; be able to differentiate between abrogated rulings and the texts that abrogate them; know which parts of the *Sunnah* have unquestioned validity and be able to differentiate between complete and incomplete chains of narration and the quality of the narrators; have knowledge of the points of consensus and disagreement in matters of Islamic Law from the time of the Prophet's *Companions* (R.A.) onwards; and be capable of juristic analogy.[12] However, the Hanafis do not require this as the over-riding formulation

of laws (legislation). Thus any person with training in administration of justice can qualify as a judge.[13]

Full sensory perception: What is required is the ability to see, hear, and speak. Accordingly a deaf person may not be appointed as a judge, because he is not able to hear others when they speak. A blind person may not be appointed, because he cannot distinguish the plaintiff from the defendant by sight, nor the one admitting another's right, nor the witness from the one being witnessed for or against. Similarly a mute person who cannot speak may not be appointed, because he cannot pronounce judgment and his sign language will not be understandable to the majority of people.[14]

The Code of Ethics

The core ethical values to be upheld by a *qāḍī* are:

- Having firm sense of accountability to Allah (Al-Qur'ān, XXXVIII:26).
- Being honest in discharging his duties.
- Having the mastery of the requisite knowledge of law and procedures.

The Prophet (ﷺ) while delineating this aspect pointed out: "Judges are of three types: two in hell, and one in the heaven. There is he who knows which is right and judges accordingly; he is in heaven. Then there is he who provides judgments based on ignorance for his fellow man, his abode is hell. Finally, there is he who knows what is right in relation to judgments but transgresses therein; his abode is also hell."[15]

In addition to the above, the jurist authorities on *ādāb al-qāḍī* (protocols of the judiciary)[16] constructed a detailed code of ethics, consisting of affirmative and negative conducts which can be summed up in seriatim:

Affirmative Conducts

He, among others:

1. Must possess a commanding personality and be knowledgeable,
2. Display patience in the court,

3. Should revise and annul his previous decisions in the light of fresh evidence to the contrary,
4. Should allow easy access to every one in the court,
5. May personally take part in investigation of crimes (conduct searches and collect evidence),
6. Should be fair in judgment,
7. Should accord equal treatment to the parties,
8. Has to pass judgment after fully acquainting himself with the facts of the case,
9. Must know the custom of people under his jurisdiction,
10. Must establish contacts with jurists of the locality.[17]

Negative Conducts

He also, among others:

1. Must not give judgment in anger or when emotionally distressed,
2. Should neither deliver judgment when feeling sleepy, or overjoyed or unduly tired nor should he make decisions when he is hungry,
3. Must not accept bribe,
4. Should not laugh at litigants or make fun of them,
5. Should not suggest answers to the litigants,
6. Should not permit a litigant to come to his house,
7. Never hesitate to seek information on matters that he is lacking,
8. Must not crave for wealth not be a slave to his lust.
9. Must not fear anyone,
10. Must not fear dismissal,
11. Should not hate his critics,
12. Must not accept gifts from people,
13. Must not be influenced by the litigants' emotional outburst.[18]

The Judicial Organization, Its Mode of Procedures in Islamic History

Basically, presided over by a judge called *qāḍī*, it was initially

vested in the person of the Prophet (ﷺ) (as the highest authority) to implement Divine justice among people.*

Later on the righteous Caliphs more or less followed the same practice. At this stage, the *Sharī'ah* court system in terms of structure, was not complex because due to the predominantly agrarian nature of society and deep influence of faith enabled people to settle their disputes outside the court in a brotherly way. Subsequently, however, with the complexity of life and man's improved technical knowledge in the field of legal justice, it acquired an elaborate structure. Therefore, in the foregoing pages we will outline these progressive dynamics of changes in the judicial machinery of Islam.

The Prophet's (ﷺ) Period

The power to adjudicate was primarily vested in the person of the Prophet (ﷺ). The Masjid-i Nabawi with him as the judge served both as the court of first instance and the appellate court. He, as an ordinary judge, tried cases to award maintenance for Hind, the aggrieved wife of Abū Sufyān, pursuant to the former's complaint about the latter's tightfistedness in the matter of spending on her.[19] He as a judge of the Supreme Court (court of appeal) revised cases that were appealed to him. For instance, in a case of murder by causation, a decision by 'Alī, which was made *ad interim*, was appealed to the Prophet (ﷺ), who thereupon upheld the sentence by 'Alī.[20] He, as the Chief Justice and supreme leader of the faithful, also undertook the investiture of judges. He appointed, among others, Ma'ādh bin Jabal and 'Alī bin Abī Ṭālib as judges.[21]

In terms of procedure, the court litigation did not involve much formalities. Justice delivery methods were expeditious, efficient and involved no technicalities to cause undue delays.[22] The procedure of

*The covenant or Charter of Madinah clearly specified the position of the holy Prophet (ﷺ) as the supreme legal authority:

"Whenever you differ about a matter *it must be referred* to God and to Muhammad (ﷺ)". See *Sīrat Ibn Ishāq*, Eng. tr. Guillaume, London, 1955, p. 232.

It is reported when a Jew, not satisfied with Prophet's judgment approached 'Umar bin Khattāb, the later learning about Prophet's judgment punished the Jew for questioning the Prophet's supreme legal authority – *Ed.*

bringing the lawsuits involved: filing it with the Prophet (ﷺ), supporting it with evidences if the other party did not admit that there was a case against him. The trial proper involved questioning the veracity of evidence adduced before the court (known as examinations-in-chief and cross-examination today),[23] and handing down the judgment.

To ensure, a fair administration of justice, the Prophet (ﷺ) laid down the following guiding principles:

1. People should be judged solely on the basis of the externals (i.e. evidence and testimony). This he meant when he declared: Since I am only a human being, like all of you, I might, when litigants come before me to decide between them, rule in favour of the more eloquent of them. If I should thereby transfer to him what is rightfully his brother's, I warn him not to take that which is not his, or I shall reserve for him a piece of hellfire."[24]
2. Proof is the responsibility of the claimant; whereas, for the claimed against, an oath is sufficient. This was laid down in the *ḥadīth* which reads: "If people's claim were granted on their face value, then they would claim one another's life and property, but the onus of proof is on the claimant and the oath is upon the one who denies the claim."[25]
3. Confession, with all of its conditions, is a proof against the confessor alone. This was the *ratio decidendi* in the case of Asif (servant) whose confession was declared to be restrictively effective against himself without having any incriminatory effect on his sex-partner, whom he named in his confession. The Prophet (ﷺ), required a separate trial for the co-accused.[26]
4. No judgment is to be passed between two disputing parties until both have been heard. This is evident from his instruction to 'Alī (a judge at his time): "O 'Alī! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favour of either until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth."[27]

The *Companions'* Era

The judicial authority, like before, primarily was vested in the person

of the caliph. Nevertheless, they also by way of delegation deputed many other eminent people of legal acumen to function as *qāḍīs*. In terms of procedure, they drawing on the principle of *siyāsah shar'iyah* (administrative policy) made some organizational and technical innovations aside from strictly adhering to the *stari decisis* set by the Prophet (ﷺ). For example, in terms of structure, 'Umar created the military tribunal,[28] appointed judges with jurisdiction over specialized issues (with jurisdiction over civil suit and another dealing with serious crimes, or court of criminal jurisdiction).[29] And in terms of improving methods of administering justice, they made some ground-breaking discoveries in the form of new techniques of discovering facts, such as giving recognition to admissibility of expert evidence as a mode of proof. An interesting case worth mentioning is a decision by 'Alī.

During the rule of 'Umar, there was a woman who was strongly fond of a man and attempted in various ways to seduce him but all failed. Then she tried to implicate him by accusing him of committing fornication with her (molesting her). She took an egg and poured its yolk between her thighs and upon her cloth. Thereafter, she went to 'Umar and lodged a complaint that she was raped. 'Umar, on seeing her egg-strained cloth, sought the opinion of a woman, who testified it to be semen. Then he consulted 'Alī to ascertain whether it was semen as alleged by the woman. 'Alī then soaked the traces of stains in boiled hot water and they subsequently turned into white-solid. On smelling it, he found it to be egg white and not semen.[30]

'Umar himself also convicted a person on the basis of the odour of wine being emitted from his mouth (what a breathalyzer can detect today).[31]

Another important development towards improving the process of adjudication was 'Umar's proclamation of judicial principles (contained in the text of his letter[32] that he sent to Abū Mūsā al-Ash'arī). The most important provisions of which are as follows:

- Judicial function is a solemn duty.
- A judge must fully acquaint himself with the facts of a case and its circumstances before arriving at his judgment.
- A judge must give equal treatment to the disputants (so that man of high position would not hope for getting scot-free from

accountability and the weak person will not lose confidence in judiciary by thinking that he may not get justice),

- The onus of proof is on the complaint and the oath on the defendant,
- Reconciliation is lawful among Muslims; except that which makes a lawful prohibited and renders the prohibited lawful,
- He who claims on the strength of an absent evidence, fix a time-limit for him to produce it. If he fails to furnish such evidence dismiss his claim,
- Do not hesitate to review your yesterday's decision if it was proven not to be right (if you have erred in law). Because it is better to return to what is right than to clinging onto what is wrong,
- Evidence of all Muslims is admissible except; who has been flogged for *qadhaf* (false accusation of *zinā*), found guilty of perjury and the one has an interest in the case (relative or affiliate to the claimant),
- Allah knows the hidden secrets of His servants and has put a cover upon them in crimes punishable with fixed penalties (*hudūd*) except those that are exposed through evidence to us.

The above provisions of the stated document delineated many procedural aspects for *modus operandi* of the *Sharī'ah* courts upon which the later jurists heavily drew when detailing with *fiqh al-muḥakamāt*.

Again 'Umar outlined the source material from which the applicable law (legislation) could be researched and obtained. This is contained in one of his letters which he wrote to Qādī Shurayh: "If a case is presented to you, which is treated in the Qur'ān then decide accordingly and do not go against the Qur'ānic injunctions; and if such a case is not mentioned in the Qur'ān then find the applicable *Sunnah* and decide accordingly. But if the there is no such precedent/ruling (*sābiqah al-qaḍā'iyyah*) either in the Qur'ān or the *Sunnah*, then search for the opinion of the leading legal scholars. But if a case involves totally unprecedented (novel) question then resolve it according to your own intellectual reasoning (*ijtihād*) and consult the people of knowledge and righteousness if needed."[33]

The Muslim Jurists Era

This period started from the second century A.H. and continued till

the demise of the Ottoman caliphate in 1924 C.E. The most important feature in this era was the jurisprudential formulation of the superstructure of the entire Islamic law, including *fiqh al-muhakamāt*, at the hands of the founding leaders of the classical schools of Islamic jurisprudence and other independent leading Muslim thinkers.[34] In order to appreciate, the law of procedure as developed by the *fuqahā'* or decreed by the states, one must outline a brief outline of court structure first.

The Court Structure

The structural developments in terms of organization of the court system,[35] were as follows:

1. The post of Chief of the judges (*qāḍī al-quḍḍāt*) who, among others, was responsible for the appointment and removal of judges, was created during the reign of Hārūn al-Rashīd.
2. The institution of *iftā'* (court advisors) was added to the court structure in the time of 'Umar bin 'Abd al-'Azīz. Its main function was to advise the *qāḍī* on points of law.
3. Formal creation of courts/judicial bodies of different jurisdiction: First, instituting the single *qāḍī* court with jurisdiction only over financial claims, marital disputes and other private civil suits. Second, designating another body known as *shurṭah* (a police organization charged with maintaining order and exercising punitive jurisdiction also known as *wālī al-jarā'im*) not only investigated and executed the punishments but adjudicated as well. According to Ibn Khaldūn all offences of *ḥudūd*, *qiṣāṣ* and *ta'zīr* were heard, judged and executed by the *shurṭah*. Third, creating an appellate body through which a decision made by the above two could be appealed to the rulers (*sulṭān*, *caliph*, *amīr*). The body was known as *maẓālim* (grievances) a body primarily responsible for correcting all administrative injustices.[36] It declined with the decline of the dynasties in history – the body was not a court proper and even its functionaries were not called *qāḍī* but *wālī al-maẓālim* – a kind of justice department in our time.*

*Under Mughul emperor, Awrangzīb (1658-1707), *wakīl-i shar'is* were appointed to help the people in disputes with the state. It was like the *dīwān-i maẓālim*. See Justice M.B. Ahmad, *Judicial System of the Mughul Empire*, Karachi, 1978, p. 275.

4. Assigning some extra-judicial functions to *qādī* which are alien to the judicial function in the modern setting, such as administration of *waqf*, acting as officers of *ḥisbah* (market inspectors) and policing buildings and public highways.
5. Designating other officials to the courts (in some jurisdictions like Egypt and Andalusia) to facilitate the running of the courts' proceedings, which included: *shuhūd* (two witnesses with the primary function of witnessing the hearing); *a'wan* (auxiliaries) legal assistants to the *qāḍī* who were responsible for maintaining order when the court was in session; *kātib* (clerk) responsible for recording all the statements made by the parties during the hearing and keeping all the files and archives, and participating in the discussion between *qāḍī* and his *mushawar* (advisors); *muzakkī* (officials responsible for purgation of the witnesses' character); *mutarjims* (two court interpreters); *bawwāb* (doorkeepers/ushers *ḥājibs* (body guards official to the *qāḍī* allowing only the proper party to have access to him); responsible for maintaining the order between litigants and the public; *jihwaz* (disciplinary official) to oversaw the disciplinary matters during the hearing; *qasim* (distributor supervising the division of goods and properties); *amīn al-hukm* (the legal trustees) responsible for safeguarding and administering the property of the orphans became defunct in 10th century *Hijri*; and *khāzin dīwān al-hukm* the keeper of court's archives (introduced in the middle of the 4th century of *Hijri*).[37]

The Code of Procedure

To regulate the *modus operandi* of the court proceedings, the *fuqahā'* have detailed a body of rules pertinent to *muhakamāt*. But their treatment of the subject is somewhat topical and scattered. Nevertheless, if this body of rules is surveyed and synthesized, a structured code of procedure similar to modern codes will emerge. Therefore, a reorganized presentation (after the pattern of modern law of procedure) of *fuqahā's* contribution to the law of judicial proceedings points to two types of procedures, namely civil litigation and criminal prosecution, which we detail here accordingly.

Civil Litigation (or Civil Procedure)

Civil litigation was instituted when there was a suit pertaining to the infringement of some right or a complaint about the infliction of some loss or harm on people's property. According to the jurists' definition, the following cases invoked such proceedings:[38]

- Breach of contracts, their terms and conditions in the area of commercial transactions (*al-ʿuqūd-māliyyah*),
- Matters of family law (*mawḍuʿāt al-usrah*),
- Property ownership claims (*milkiyyat al-amwāl*),
- Claims for reparation of losses and damages that one has incurred (*itlāf al-daman*).

The court's jurisdiction to adjudicate on the above claims involved four stages, namely pre-trial, trial, execution of the judicial verdict and appeal.

Pre-trail

The complaint (*dʿawā*) was filed with the court. Then the court before proceeding with the action, verified that: 1) the party filing it was legally competent (if not it was represented by its legal guardian or attorney); 2) the lawsuit itself did not pertain to vexatious or uncertain matter; 3) and all its particulars were fully spelt out. Then if all these were satisfied, it set the date for the hearing (and priority was given to travellers, foreign citizens and women). Thereafter, the writ of summon was served on the defendant through *rājil* (messenger) accompained with the plaintiff or without him. However, attendance of the defendant was not mandatory, exemption was allowed in the case of those who were unable to attend the hearing, instead either their plea was heard by a commission at their residence[39] or they were defended by their representatives (*wukalāʾ/wakīl*).[40]

But if some one without any reasonable excuse refused to comply with the summon, he was found guilty of contempt of court. He was compelled to appear before the court by the local authority at the request from the *qādī* or was defended by an attorney.[41]

The trial

During the trial both the defendant and the plaintiff were asked to sit before the judge. First the plaintiff was asked to present his case and the judge began to record it verbatim. If in the opinion of the judge, the plaintiff could not present his case well, he was asked to go and revise it. But in the event the court was satisfied, it called upon the defendant as to what he had to say. If the defendant admitted (the truth of the claim), then it was recorded and the judgment was issued in favour of the plaintiff. But in case, the defendant kept silent, there were two opinions: he was imprisoned till answered as maintained by the Ḥanafīs, or it was taken as indication of his agreement with the allegation and found liable as held by the Shāfi'īs.[42]

However, in a situation where the defendant denied the claim, the *qāḍī* asked the plaintiff to produce evidence. If the plaintiff's evidence consisted of eye-witnesses, the court after investigation of the witnesses' character and hearing them, if satisfied, granted his claim. But in case, the plaintiff failed to produce the required evidence, the defendant was made to take an oath that the complaint against him was not true. Once he did so, the case against him would be rejected (based on a *ḥadīth*).[43] But in case the defendant refused to take the oath the opinion among the jurists varied about further action:

According to majority of the *fuqahā'*, the onus to take oath would be shifted from the defendant to the plaintiff (once he does it, his claim would be granted, otherwise his case would be dismissed). This was based on 'Umar's decision in the case of 'Uthmān v. Miqdād whereby Miqdād asked 'Umar, "Let 'Uthmān take the oath if on his side of truth (if he is true)."[44]

Nevertheless to the Ḥanafīs, the defendant's refusal to take oath amounts to his admission of the case against him, and the burden of oath does not shift to the plaintiff. They support their position by quoting the Prophet's statement and his decision in the case of Ḥadramī v. Kindī (involving usurpation of a piece of land by the defendant). In this case, in spite of Ḥadramī's contention that Kindī is not a pious person, his statement under oath does not have any meaning to him, the Prophet (ﷺ) said: "Nevertheless you have to accept his statement under oath."[45]

At the end of the trial, the court issued a written judgment (*i'lam*).

Two copies, one was given to the winning party and another kept in the court, box or scatchel (*qimatrah*).[46]

Execution of Judgments

The court after handing down the decision if not appealed against, in liaison with local authorities, executed and enforced the judgment.[47]

The Appeal Stage

Any judgment delivered by the trial court was appeallable[48] against or reversible or reviewable by the higher courts. The legal basis for appealing procedure were/are: First, 'Alī's statement in the case of a dispute over compensation by different tribes that: 'Hold fast to my judgment *ad interim** till you appear before the Messenger of Allah (ﷺ) and he decides your case." Second 'Umar's instruction to Abū Mūsā: "Never hesitate to revise your decision that you delivered yesterday."[49] Third, the caliphs' judicial practices as justice will not be perfected unless there is a procedure of challenging it before a court of higher authority.[50]

Criminal Prosecution

Criminal prosecution is triggered once a report for the commission of a crime as defined by Islamic law has been filed with the court. There are three categories of justifiable crimes in Islamic law:

1. The *ḥudūd*: refer to crimes which carry specified punishments as set forth in the Qur'ān or the *Sunnah*. They consist of five undisputed cases namely adultery, libellous accusation of adultery, theft and highway robbery; and three disputed cases of apostasy, consumption of alcoholic drinks and attempts to overthrow a government by force. Some are punishable by death penalty and others require, amputation and flogging.[51]
2. *Qiṣāṣ* and *diyat:* designate crimes leading to the loss of life and limbs – carrying punishments ranging from death penalty to compensation (in the form of *diyat* and *arsh*).[52]
3. *Ta'zīr:* signifies crimes for violations of some Islamic prohibitions

* For the meantime.

as specified by the Qur'ān and the *Sunnah* or those defined by the Islamic state in response to evolving needs to society -- may be punishable by death penalty, jail term, fines, and rehabilitative confinement.[53]

The prosecution of the above crimes involves the following stages:

Pre-trial Stage (Criminal Investigation and Arrest)

This process started once complaint pertaining to the commission of the above offences was filed with the court. The person filing the case could either be the aggrieved person, for instance in *qisās, diyat*, theft, robbery and less serious *ta'zīr* cases or an authorized official, such as the one belonging to the historical institution of *hisbah* or *mazālim* (public complaint authority)[54] in other serious offences involving *hudūd* or the religious department in some countries like Malaysia). Thereafter, the *qādī* if satisfied, depending on the type of the accused named in the charge, adopted the following procedures: If the accused had no previous conviction, he required a *prima facie* case to order his arrest; and in the event the accused was notorious for criminality, he immediately ordered his arrest and trial; and if the accused was of unknown identity, he required his precautionary detention till the investigation about his crime was completed.[55]

Criminal Trial

The mode of criminal trial is primarily determined on the basis of the nature of crime that has been committed: in *ḥudūd* crimes once the charges are read out against the accused, he may either makes a full and free confession or denies it, or keeps silent. In the first situation, the court if satisfied will pass the verdict of guilty against him. Nevertheless in case of his denial or silence, unlike in civil cases, no adverse inferences will be made against the accused but instead the judge would require the affected party/their lawyer or the prosecution officer whichever may be the case to prove their case.[56] The types of proof may differ depending on the nature of the offence for which the accused has been indicted. They may be in the form of oral evidence by eyewitnesses, or confession by the accused, or material evidences connecting him to the case, such

as blood specimen etc.[57] At the end of the trial, the judge after meticulously examining the evidences (their scrutiny by cross-examinations, etc.), if satisfied that the case has been made out against the accused, "beyond any shadow of doubt", will proceed to write his judgment.[58]

Execution of the Judgments

Once, the sentence is meted out and not challenged by appeal but confirmed by the higher court (in *ḥudūd* or *qiṣāṣ* cases as Prophet (ﷺ) confirmed 'Alī's decision in the case of Zubyah), the judge will proceed to: first personally supervised the execution; and second instruct the witnesses to assist the officer in the implementation of the sentence upon the convict.[59]

However, it is to be noted that when implementing, the sentences upon the convict, the judges and executioner's conducts are governed by a set of rules commensurating with the specifications of the sentences in question. For instance, in *ḥadd* crimes once they were proved by sufficiently convincing proof,[60] the judge has no discretion or authority whatsoever to change or reduce their amount of (punishment). Nevertheless, the emergence of any doubt even before the stage of their execution will drop or mitigate them.[61]

But in the case of *ta'zīr* sentences, the judges have wider discretion: first to choose various types of sentences, such as counseling, fines, public or private censure, seizure of property, confinement in the home or place of detention, and flogging or some time even death penalty against the offender provided that such will be fitting for him. Second, to require lower standard of proof for their establishments.[62]

Implementing *qiṣāṣ* (for intentional killing and injuries) requires somewhat different process. In cases as such the victim's family has more say in the sense that after the verdict of the court, they have absolute authority either to press for the execution of the punishment on the offender or pardon him and accept compensation in lieu of *qiṣāṣ*. Diyah sentences primarily being monetary in nature can also be demanded, compromised or totally forgone.[63]

The Court Proceedings Today

The advancement of human progress in the field of administration

on the one hand and the complexity of life and its problems (including the impact of colonization and imposition European legal codes on Muslim lands) on the other, have led to the reorganization (administratively) of the *Sharī'ah* courts. For instance, pursuant to the proclamation of Gulhane Charter in 1839, the movements towards reforming the Turkey, the last of the Muslim Caliphate, resulted in the abolition of *ḥisbah* and *maẓālim* institution. In 1926, Turkey adopted Swiss Code of Obligation as well as its Civil Code.[64] Thereafter, the development of the *Sharī'ah* courts and its code of procedure in the entire Muslim world were either totally or partly modelled after the pattern of the Civil Courts that were implanted in the Muslim territories. For instance, the judicial system and its procedure in Saudi Arabia (pursuant to Royal decree in 1927 and later on in 1975) and Malaysia obviously indicate such impacts.

The Saudi Model

The Structure of its Court System

There judicial hierarchy consists of the following:[65]

Summary courts (*al-Maḥākim al-Juz'iyyah*): It consists of one *qāḍī* who hears cases involving wine drinking, civil claims amounting 8000 *riyāls* and matrimonial disputes.

General courts (*al-Maḥākim al-'Āmmah):* It has jurisdiction over all civil and criminal cases. Presided by one *qāḍī* unless the case involves death penalty, assault and abduction, in which case a penal of three judges will adjudicate.[66]

Courts of Appeal (*Maḥkamāt al-Tam'iz*): It hears appeal from lower courts. Appeals against sentences of death penalty and amputation are heard by a penal of five judges and their decision is by majority.

Supreme Judicial Council (*Majlis al-Qaḍā al-A'lā*): It is the highest court consisting of ten members and is chaired by a minister. Five of the judges are permanent members in charge of reviewing case of death penalty and amputation and other five are part-timers. The full members of the Council decide question of law tbe applied and supervise the overall activity of the judiciary.

Its Code of Procedure

It involves all the four stages of commencement of the case, trial, judgment, execution (and appeal as the case may be):

Pre-trial

The case begins when a complaint (in civil suits is lodged with the local regional governor's office. It will persuade the parties to settle it outside the court, if such an attempt fails then it refers them to the proper court for further actions. Once the claim is brought to the court, the judge sets the date for hearing and notifies the defendant. Then he issues a summon to be served on the defendant or his attorney. In case the defendant defaults, the judge with the aid of police realizes the compulsory appearance of the defendant. On the other hand, default on part of the plaintiff (without any excuse) may result in dismissal of his case.[67]

The Procedure at Trial

During the trial, parties may present their case personally or through their attorneys. Civil cases are tried by a single judge and criminal cases by a penal of three to five. Trials are normally held in open court unless otherwise held in camera (in the interest of morals or public policy issues). Plaintiff presents his case first and if he has established a *prima facie* case then the defendant is called to enter his defense; the trial can be adjourned at the parties' requests or their attorneys to prepare their case. Then witnesses are examined by the judge and their adversaries and also cross-examine them to test veracity (of evidence by the *qāḍī*) or questioned credibility of witnesses (by the adversary). The types of accepted evidences include, oral testimony, expert opinion (technical/ scientific issues), admission, real evidence (physical), documents (original or certified copy). If accusation is proven, oath of denial by the defendant in a civil suit is taken into account.[68]

The Judgment

The judgment will be announced in open court at the end of the trial.[69]

The Appeal

Either party if dissatisfied can appeal to the appellate court. It is filed with the trial court, then processed to the court of appeal. When an appeal is pending, execution of the lower courts judgment is stayed. During the appeal the appellate court after thoroughly reviewing the case may reverse the judgment (on question of law, fact or procedure) or dismiss it. In the case of reversal, it sends back the case to the lower court, it would be referred to another judge. But in the event, the trial courts' decision was affirmed, it becomes final and enforceable.[70]

The Malaysian Model

Malaysia is a federal state consisting of thirteen states and Federal Territory of Kuala Lumpur, the capital. The federation has its own constitution which is supreme. It has dual system of courts, namely Civil and *Sharī'ah* courts. The Federal constitution as the governing law of land regulates the administration of Islamic law and judiciary in this country. According to Ninth Schedule List II of the said constitution, with the exception of Federal Territory, the power to enact laws and administer Islamic law vests with the respective states.[71] Accordingly each of the states has its own statutory laws, namely the Administration of Islamic Law Enactments that outlines the structure of the *Sharī'ah* court and the codes of procedures that deal with *modus operandi* of the courts. For the purpose of this study, we briefly outline the hierarchy of the *Sharī'ah* court in the state of Selangor and as an example of the *Sharī'ah* code of procedure, we may also refer to the practice by the State of Kelantan.

The Court Structure in Selangor

According to Selangor Administration of Islamic law Enactment, 1989, structure and jurisdiction of the Sharī'ah courts are as follows:

The Constitution of the Courts

1. There is a three-tier court system in the state, namely *Sharī'ah*

Subordinate Courts, a *Sharī'ah* High Court and a *Sharī'ah* Appeal court.[72]

2. The Sulṭān (as the head of religion)[73] appoints a Chief *Sharī'ah* Judge, the Judge of *Sharī'ah* High Court and the judge of *Sharī'ah* Appeal Court on the advice from the State Religious Affairs Department.[74] The required qualifications for such judges are: Malaysian citizenship; experience in the field (serving as a member of the *Sharī'ah* courts even in the capacity of a prosecutor) not less than ten years or academic qualification relevant to Islamic legislation.[75]
3. The appointment of *Sharī'ah* Subordinate Courts judges are done by the Sultān but with the advice of Chief *Sharī'ah* Judge, lesser qualifications are required for such a position as any member of the *Sharī'ah* Courts or Legal Service or General Public Service can hold such a post.

The Jurisdiction

(1) The subordinate court has both criminal and civil jurisdiction. Its criminal jurisdiction is limited to offences whose punishment does not exceed two thousand *ringgit* (local currency). Its civil jurisdiction, among others, extends to monetary claims whose value does not exceed one hundred thousand *ringgit.* Thus its jurisdiction is confined to disputes over property matters.[76]

(2) The High Court has two types of jurisdictions: original and appellate. In its original jurisdiction it can hear both criminal and civil cases. Under its criminal jurisdiction, it can adjudicate on all crimes that are defined by the Selangor Administration of Islamic Law Enactment, 1989; and Islamic Family Law Enactment, 1984, or to be determined by any other laws. Its civil jurisdiction is much extended as it can hear cases relating to property matters, matrimonial dispute (family law issue), etc.[77] The court by virtue of its appellate jurisdiction can hear appeal by both the parties against a decision made by the Subordinate Courts. At this stage it can order retrial, alter or reverse the trial courts decisions.[78] In addition to the above, being a higher court, it also has supervisory and revisionary jurisdiction over all the *Sharī'ah* Subordinate Courts, i.e., can on its own motion

or at the instance of the aggrieved party, in the interest of justice, can examine the trial courts record and establish the truth.[79]

(3) The *Sharī'ah* Court of Appeal is a court of appeal proper as it has only appellate jurisdiction. In this capacity it has power to hear appeal against any decision of the *Sharī'ah* High Courts; first, if such a decision was made in the exercise of its original; second, if it was a decision of the *Sharī'ah* High Courts in its appellate jurisdiction, but it involves a question of law or public interest, which have not been met there.[80]

Note: none of the above courts has jurisdiction over non-Muslims.[81]

Officials Assisting the Courts

Other officials that are attached to the courts are:[82]

1. Chief Registrar of the *Sharī'ah* Court of Appeal,
2. Registrar of *Sharī'ah* High Court,
3. Assistant Registrar of *Sharī'ah* Subordinate Courts,
4. Chief *Sharī'ah* Prosecutors,
5. Deputy *Sharī'ah* Prosecutors,
6. Religious Enforcement Officers,
7. Legal officers to represent parties in the court (Penguam Syarie),
8. The Bailiffs.

Procedures Before the *Sharī'ah* Court in the State of Kelantan

Subject to the Ninth Schedule, List II – State List of the Federal Constitution and Muslim Courts Act 1965 (Amendment) 1984, each state of Malaysia has its own code of civil and criminal procedures.[83] Accordingly, Kelantan has also its own laws, namely Kelantan *Sharī'ah* Civil Procedure Enactment, 1984 and Kelantan *Sharī'ah* Criminal Procedure Enactment, 1985.

Civil Procedure

The adjudication of cases involving civil suits are carried out in

accordance with Kelantan *Sharī'ah* Civil Procedure Enactment, 1984 as we noted before. It provides for the following procedures:

PRE-TRIAL

(1) The affidavit about the complaint is submitted to the court, which details the cause of the case with supportive facts about it. Oral application may also be allowed at the discretion of the court.[84] If a person is out of the jurisdiction, he will be represented by his authorized representative. A minor or mentally unsound person may sue or be sued by his guardian *ad liten.* However, the legal guardian may be removed by the court as a party if in the opinion of the court he is unfit or in a case of a minor, once he reaches puberty, his guardian will be discharged.[85]

(2) The court then serves the notice about the case to all the interested parties and fixes the date for mention of the case.[86] Upon receiving the notice of the claim, if the defendant contests the claim, he must file his denial or even counter claim, if he has any, two days before the issuance of the written summon, which then it will be served on the plaintiff. The plaintiff if denies the counter claim, must file it with court within a time frame as directed by the court. Any pleading which in the opinion of the court does not contain sufficient particulars, it on its own motion or on application of any party to the case may stay proceedings – pending furnishing better particulars. Then it issues a written summon to the defendant to attend the trial and threatens him that in case of his non-appearance, the court may allow the claim against him. The Registrar after ensuring that the summon is in the proper format, delivers it to the plaintiff to serve it on the defendant. If the plaintiff fails to serve such a summon to the defendant, more than twelve months after it was issued, it lapses except with the leave from the court.[87]

(3) A plaintiff may at any time before the judgment withdraws his claim wholly or in part by giving a notice to the defendant. Such a notice once issued can be used as defense of *res judicata* by the defendant in any subsequent proceedings. Similarly a defendant may at any time drop his defense wholly or in part by giving a

notice to the plaintiff. Additionally, the parties may reach an amicable settlement of the case out of court before trial, which the court endorses if satisfied.[88]

Trial

For the trial to proceed, the parties must appear before the court in person or represented by their solicitors. A minor or lunatic will be represented by his guardian *ad liten.* If the defendant fails to appear in the court, the judge after being satisfied that the summon has been served on him, may hear the case in his absence. But in case the plaintiff fails to appear for trial, his claim may be dismissed but the counter claim will be heard. Nevertheless any judgment entered in absentia may be set aside and the case reheard if good reason for such absence be shown.[89]

Once the parties appear during the hearing, the trial which will be held in open court will proceed as follows:[90]

1. Each party opens its case before calling evidence.
2. If the evidence consists of oral evidence, the court may adjourn the trial for such purpose.
3. If defense does not file a defense plea, the court requires the plaintiff to provide his case by evidence affidavit.
4. Each party after presenting his evidence may sum up its case.

Judgment

Judgment will be pronounced in open court. It will be written by the Chief *qāḍī* but may be read by the Registrar in his absence. If the person or his solicitor was not present during the judgment, he will be served with the copy of the judgment and an order for the type of the action that should be taken would be made. Every judgment will take effect from the date that it was given.[91]

Appeal

Any party who is dissatisfied with the judgment can file an appeal with the *Sharī'ah* Court of Appeal. A party intending to appeal must give

a notice to the effect to the Registrar of the Court in question within fourteen days from date of judgment. The court if satisfied may cause stay of execution for a duration as it deems fit. Any decisions made by the court of appeal would be final.[92]

Execution

The plaintiff once winning the case can apply for leave to execute the judgment. This application will be made to the Registrar. Such an application even may be made *ex parte*, and it may be granted with the condition of serving it on the absent party.[93]

Criminal Procedure

According to Kelantan *Sharī'ah* Criminal Procedure Enactment (1983 (amended 1985), the *Shari'ah* court has power to hear, inquire into, issue summons, issue warrants of arrest and search in respect of any crimes that are to be committed within its jurisdiction.[94] These procedures can be categorized as follows:

Pre-trial

The preliminary proceedings begins once a member of public gives information pertaining to the commission of an indictable crime, to the nearest Religious Inspector or Mosque official, or Police officer or District Chief, or Village Chief or qualified religious teacher.[95] For instance, a religious officer after receiving such information orally, reduces it in writing and reads it over to the informant. Then if he suspects that such an offence is being committed, reports it to the prosecutor and he in person or his deputy proceeds to the spot to inquire into the facts and take the necessary measures.[96] In the process of investigation, the religious officer has power to record statements of any person who is acquainted with the facts and circumstances of the case.[97]

Thereafter, an official report pertaining to the case is presented to the court. Upon examining it, the registrar if satisfied, will issue the summon to the accused to appear before the court. In the summon, he describes to him the general nature of the offence that he will be charged

for together with the applicable punishment thereof.[98] Then the court will issue the warrant[99] for arresting[100] the accused to the religious officer or Chief Police Officer. Once arrested, the accused can remain in police custody or can apply for bailment with sufficient surety or stay out of prison on his own personal bond, provided that he should be produced before the court without any delay.

Another step before trial is that the charges will be spelt out to the accused in sufficient details, namely the nature of the offence, the manner of its commission and time and place of committing it. For every distinct offence there will be separate charges and every such charge will be tried separately unless such offences are: of the same kind, form part of the same transaction, and are indistinguishable.[101]

TRIAL

The procedures during trial are as follows:

(1) When the accused is produced before the court, the charges are read and explained to him and he will be asked as to whether he pleads guilty or claims trial. If he pleads guilty, the court before recording it has to ascertain that accused knows the nature and consequences of his plea. If he does not admit the charge, then the court requires the prosecution (or the complainant) to provide his case. If the evidence will be in the form of testimony of people, the court will summon them to testify before it. The accused has the right to cross-examine all the witnesses for the prosecution.[102]

(2) If the court, after examining all the evidences adduced by the prosecution, finds that no case has been made out against the accused, it asks the accused to take an oath of denial according to *ḥukm-i Shar'* and order his acquittal. But in the event the court, after hearing the prosecution evidence, presumes that the accused has committed the offence, it asks the accused (or his solicitor) to enter his defense plea. If the defense of the accused consists of documents and persons to be produced before the court, he can apply to the court to the effect. Then the prosecution may reply to the defense plea. At the end, if the court finds that the defense has been made out, it may sentence the accused according to the applicable law.[103]

Judgment

Judgment will be pronounced in the open court immediately after the hearing or at some other late date. The verdict will be explained to the accused and a copy of the judgment or its translation will be given to him/or his solicitor.[105]

Execution

The court after passing judgment takes steps to execute the prescribed sentences[106] such as imprisonment or fine on the accused. For the implementation of jail sentences, it issues warrants to Religious Inspector to take the accused to prison and for the implementation of fine, it prescribes the mode of payment and duration thereof.[107]

Appeal

The appeal can be made to a State Constituted *Sharī'ah* Appeal Committee, headed by the State *Muftī* or to the *Sharī'ah* Appeal Court. The grounds for appeal are: error in law or fact by the trial court; excessive severity of the sentence; or the inadequacy of the sentence in question.[108] The procedure for appeal is as follows:

> The party appealing the sentence must give a notice to the sentencing court addressed to the Court of Appeal. Then the trial court serves the appellant with a copy of the grounds of its decision. Within fourteen days after serving of the above document to the appellant, the appellant shall lodge with the clerk of the trial court a petition of appeal in triplicate addressed to the *Sharī'ah* Appeal Court. The petition in question contains a short account of the grounds for appeal. The judgment against the accused will be stayed pending the result of the appeal. A date for hearing the appeal will be fixed by the Appellate Court.[109]

During the hearing, the appellant will be heard, and then the respondent will be asked to respond. Thereafter the appellant will be asked to reply. In the event the appellant does not appear to support his appeal, the court

may still consider his appeal. But in the case of respondent's non-appearance, if the court is not satisfied that the notice of appeal was served upon him, it may adjourn the hearing of the appeal for a future date (allowing time for serving him the notice). Nevertheless if the service of notice cannot be affected to him, then it proceeds to hear the appeal in his absence. The verdict of the Court of Appeal will also be announced in open court.[110]

Conclusion

The main trend of thought emerging from the study are: First, Islamic law contains sufficient guiding principles necessary for creating a well structured system of judiciary with efficient process of trial and hearing. Secondly, the existing legal framework for administering justice in Islam is robust as well as adaptable – is capable of assimilating all the means and modes that will be necessary for the cause of justice in changing environments. This we proved to be the case in the course of our presentation of the chronological evolution of the Islamic courts in various phases of Islamic civilization. Finally, the current development, representing Muslim agenda for the reinstatement of Islamic law and its institution, is another evidence of both resilience and assimilation to administer justice in accordance with the Islamic ethos.

Notes and References

1. Al-Qur'ān. LVII:25.
2. Al-Qur'ān. IV:58. There are many other verses containing the same message. see al-Qur'ān. IV:105; V:49; etc.
3. Historical Development of Judiciary, at *www.islamonline.net.*
4. This is the operational logic of what the jurists in the past try to reason. "judgeship belongs to the category of religious authority to rule over Muslims (*wilāyah*), thus unfitting for a non-Muslim. See Muhammad al-Habib al-Tajkani. *al-Nazariyyāt al-'Āmmah li al-Qadā wa al-Ithbāt fi al-Sharī'ah al-Islāmiyyah.* al-'Iraq: Dar al-Shu'un al-Thaqafiyyah al-'Ammah. 1985. p. 116; Anwar al-'Umarusi. *al-Tahsrī' wa al-Qadā fi al-Islām.* Iskandariyyah. Ma'ssassat Shabab al-Jami'ah. 1984. p. 67.

5. The jurists explain this by saying that since they cannot have custody over their own affairs, thus cannot have the same over other people, see, *ibid.*
6. 'Abd al-Karīm Zaydān, *Niẓām al-Qaḍā fi al-Sharī'ah al-Islāmiyyah,* Baghdad, Jami' at Baghdad, 1984, p. 25. See also *Judicial System in Islam* at www.islamtoday.com
7. Abī 'Abd al-Rahmān Ibn Shu'ayb al-Nasā'i, *Sunan al-Nasā'ī,* Egypt, Mustafa al-Babi al-Halabi, 1964, vol. VIII, p. 227.
8. See al-Tajkani, *op. cit.*, pp. 111-113.
9. *Ibid.*, pp. 113-114.
10. *Ibid.*, p. 114. Al-Awwa also commented on the issue and agreed with the statement of the Zāhiri school that the *hadīth* debars women to assume the post of the caliph when the caliphate was the from of government in the past. Today's heads of the governments are not the caliphs, thus there is no harm if women are posted as heads of the states, see Muhammad Salim al-Awwa, *al-Fiqh al-Islāmi fi Tarīq al-Tajdīd,* Qatar, Jami'yyat Qatar, 1998, p. 60.
11. Zaydan, *op. cit.*, pp. 28-90.
12. Zaydan, *op. cit.*, p. 29 and see also *Judicial System in Islam* at www.islamtoday.com
13. Zaydan, *ibid.*
14. *Ibid.*, pp. 31-32, and see also *Judicial System in Islam at www.islamtoday.com*
15. *Mishkāt al-Maṣābih,* vol. II, pp. 597-598.
16. This is adopted by, Muhammad Ibrahim H.I. Surty, "The Ethical Code and Organized Procedure of Early Islamic Law" with reference to al-Kashshāf's *Ādāb al-Qādī,* in *Criminal Justice in Islam,* Muhammad Abdel Haleem and ors (edits.) London, I.B.TAURIS, 2003, pp. 151-153. See similar works bearing the same title by al-Māwardī and al-Hamawī.
17. *Ibid.*
18. *Ibid.*
19. Muhammad Ibn Faraj, *'Uqdiayat Rasūl Allah,* al-Azhar, n. pp, n.d., p. 105.
20. In this case four people from different tribes of Yemen went on hunting a lion. The lion fell in the pit (known as *zubyah*). One of them while chasing it also slipped. Then when he was about to fall he caught hold of the second, and the second in turn did the same of the third and the third in the same way grabbed from the fourth. Consequently all of them became an easy prey for the much provoked lion and died. The tribe of the three last persons demanded compensation from the tribe of the first man. 'Alī ruled in the case, which was subsequently appealed to the Prophet (ﷺ). Muhammad Ibn 'Alī al-Shawkānī, *Nayl al-Awṭār,* Beirut, Dar al-Jalil, 1973), vol. VII, p. 234. For details of the case see Sayed Sikandar Shah Heneef, *Homicide in Islam,* Kuala Lumpur, A.S. Noordeen, 2000, p. 50.
21. There were others, such as Hudhayfah and 'Amru Ibn al-'Ās who served as the judges during the Prophet's period. For details see, Muhammad al-Zuhayli, *Tārīkh al-Qaḍā fi al-Islām,* Beirut, Dar al-Fikr al-Mu'asir, 1995, pp. 64-74.

22. Mahmood ur Rehman, "The Concept of Justice in Islam", in *Shariah and the Legal Profession*, S.M. Haider (Ed.), Lahore, Ferozesons Ltd., 1985, p. 173.
23. This procedure can be gathered from the line of questionings that the Prophet (ﷺ) marshalled against a confessor of adultery, Ma'iz. Among other things, he asked him: are you sober and sane? Do you understand what is *zinā* (adultery)? Has it happened from you the way that is supposed to occur? See S.M. Haider (Ed.) and see also Ghulam Murtaza Azad, *Judicial System of Islam*, Islamabad, Islamic Research Institute, 1987, pp. 96-97.
24. 'Ali Ibn 'Umar al-Dār Qutnī, *Sunan al-Dār Qutnī*, Cairo, Dar al-Mahasin, 1966, vol. 4, p. 239.
25. Ibn Faraj, *'Uqdiyat Rasūl Allah*, pp. 105-106.
26. *Ibid.*
27. Muhammad Ibn Yazīd, Ibn Mājah, *Sunan Ibn Mājah*, Beirut, Ihya al-Turath al-Arabi, n.d., vol. 2, p. 774.
28. This court was presided over by Abū Darda', Muhammad al-Zuhayli, p. 127.
29. The Caliph himself and Abū Mūsā were dealing with criminal cases while small claims (particularly disputes over money and property) were adjudicated by other judges, see *ibid.*, p. 128.
30. Islam Ghanem, *Islamic Medical Jurisprudence*, London, Arthar Probsthain, 1982, p. 29.
31. Abī 'Abd Allah Malik Ibn Anas, *al-Muwaṭṭā*, Beriut, Ihya al-Turath al-Islamiyyah, 1967, p. 242.
32. See al-Zuhayli, pp. 109-110; and also see al-Tajkani, *op. cit.*, pp. 41-42.
33. Al-Zuhayli, *ibid.*, p. 119.
34. My justification for lumping together of different periods, the Ummayad, the 'Abbāsid and then Ottoman, under the title of the jurists' period is that the body of law that represents the law of procedure from Islamic perspective was constructed throughout these periods – a theme which constitute the end-goal of this paper. What we have today is a hybrid of Islamic law and European laws, that we will refer later. For details of treating the development separately see *ibid.*, pp. 161-472; Mahmoodur Rahman, *The Administration of Justice in Islam*, New Delhi, Kitab Bhavan, 1986, pp. 1-51; Mohammad Muslehuddin, *Judicial System of Islam, its Origin and Development*, Lahore, Islamic Publications (Pvt.) Ltd., 1991, pp. 26-100.
35. *Judicial System of Islam*, at www.islamtoday.com; see also Nawawī, *The Machinery of Islamic Justice in the Kingdom of Saudi Arabia and Malaysia*, pp. 49-54.
36. *Ibid.*, pp. 37-44.
37. *Ibid.*, pp. 13-49; also *Judicial System of Islam*, at www.islamtoday.com.
38. *Al-Tajkani*, *op. cit.*, p. 164.
39. On the authority of the Prophet's decision who dispatched commissions to try a woman, at her residence, *ibid.*

40. Azad, *Judicial System of Islam,* pp. 71-74.
41. *Ibid.*
42. *Ibid.*, pp. 77; al-Tajkani, *op. cit.*, pp. 179-180.
43. Azad, *Judicial System of Islam,* p. 78.
44. *Ibid.*, see also, Ahmad Ibrahim Bik, *Turuq al-Ithbat al-Shar'iyyah,* Azhar; n.d., 1985, p. 384.
45. Azad, *Judicial System of Islam,* p. 79; Bik., p. 383.
46. *Ibid.*
47. *Ibid.*, p. 83.
48. Unlike the allegation by some quarters that there exists no system of appeal in Islamic law, it has existed in theory as well as practice. The caliphs used to hear appeals and the *fuqaha'* discussed it under the title of *ista'naf* and *murafa'at,* see Hashim bin Mchat, *Malaysian Law and Islamic law on Sentencing,* Kuala Lumpur, International Law Book Services, 1991, p. 111.
49. Azad, *Judicial System of Islam,* p. 84.
50. Qadri, *Islamic Jurisprudence in the Modern World,* p. 497.
51. For details see specialized studies such as, 'Abd al-Qadir 'Awdah, *al-Tashri' al-Jina'ī al-Islāmi,* Beirut, Dar al-Kitab al-'Arabi, n.d., vol. 2.
52. For details see *ibid.*
53. See *ibid.*
54. Historically, the complaints were either initiated by private citizen or officials from the *mazālim* or *muhtasib.* Today with the demise of the aforementioned crime prevention agencies, in most of the Muslim states, the public prosecution (or police) institute the criminal action against the accused.
55. Adel Omar Sherif, "Generalities on Criminal procedures under Islamic *Sharī'ah*", in *Criminal Justice in Islam,* Haleem, (Ed.), p. 4.
56. *Ibid.*, pp. 9-10.
57. For details of the law of proof see Bassiouni, *The Islamic Criminal Justice System,* pp. 115-113.
58. Haleem, p. 24.
59. Azad, *Judicial System of Islam,* pp. 83-107, Tajkani, *op. cit.*, p. 197.
60. No weight is attached to weak and flimsy evidence. Even the admissibility of circumstantial evidence is disputed among the jurists. See for details Anwar Mahmud Dabur, *al-Qarā'in wa Dawruha fi al-Fiqh al-Jinā'i al-Islāmi.* Cairo, Dar al-Thaqafah al-Arabiyyah, 1985, pp. 65-75, and also Haleem, *Criminal Justice in Islam,* pp. 20-21.
61. Al-Tajkani, *op. cit.*, p. 197.
62. See 'Awdah, pp. 20-22.
63. See *ibid.*, pp. 97-110.
64. Muslehuddin, pp. 59-60.
65. Nawawī, pp. 77-80, see also al-Zuhayli, pp. 512-513.
66. al-Zuhayli, *ibid.*
67. *Nawawī,* pp. 81-83.

68. *Ibid.*, pp. 83-89.
69. *Ibid.*, p 89.
70. *Ibid.*, pp. 90-93.
71. *The Administration of Islamic Laws*, Ahmad Mohamed Ibrahim and Abdul Munir Yaacob (edits.), Kuala Lumpur, Institute of Islamic Understanding Malaysia, 1997, pp. 1-38.
72. S. 37.
73. By virtue of Article of the Federal Constitution.
74. S. 38 (1).
75. S. 38 (2) (3) (5).
76. S. 43.
77. S. 42.
78. S. 44.
79. S. 47.
80. S. 48.
81. S. 52.
82. S. 41, 54 and 55.
83. Other states' code of procedures in substance are not different from Kelantan. See Nawawī, *op. cit.*, p. 120.
84. *Ibid.*, p. 125.
85. *Ibid.*, pp. 125-126.
86. *Ibid.*
87. *Ibid.*, p. 126.
88. *Ibid.*, p. 129.
89. *Ibid.*, p. 130.
90. *Ibid.*
91. *Ibid.*, p. 131.
92. *Ibid.*, pp. 151-152.
93. For details see *ibid.*, pp. 132-135.
94. S. 98.
95. Nawawī, p. 136.
96. S. 53.
97. *Ibid.*, p. 137.
98. *Ibid.*
99. However, any arrest without warrant is also permissible if it is done by the authorized official, see, *ibid.*, p. 139.
100. If the accused resists the arrest, the law authorizes the arresting officer to use all means to secure his arrest except that he cannot cause his death, *ibid.*, p. 138.
102. *Ibid.*, pp. 142-143.
103. *Ibid.*, p. 143.
104. *Ibid.*, p. 144.
105. *Ibid.*, p. 146.

106. Malaysia does not implement the prescribed Islamic punishment but instead substitute them with *t'azīr*, such as fine, jail terms and flogging. As such the Sultān has the power to suspend, commute and remit the sentences imposed by the judge, *ibid.*, p. 148.
107. *Ibid.*, p. 147.
108. *Ibid.*, p. 149.
109. *Ibid.*
110. *Ibid.*, pp. 150-151.